No. 82-507

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IN THE

Supreme Court of the United States

October Term, 1982

EVRA CORPORATION, formerly known as Hyman-Michaels Company,

Petitioner,

v.

SWISS BANK CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 22, 1982

QUESTIONS PRESENTED

1. Is Petitioner entitled to a review by this Court of a determination by the Circuit Court sitting in Illinois that under the governing law of Illinois the traditional rule of *Hadley* v. *Baxendale,* that consequential damages will not be awarded unless the defendant was put on notice of the special circumstances giving rise to them, governed a claim of consequential damages resulting from a failure to effect promptly a wire request for transfer of funds, regardless of whether the plaintiff sued in tort or contract?

2. Is Petitioner entitled to a review by this Court of the Circuit Court's determination that on the undisputed facts respondent was not, as a matter of Illinois law, put on notice of the special circumstances giving rise to the consequential damages for which petitioner had sued?

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OPINIONS BELOW

The opinion of the Court of Appeals reversing the decision below is reported at 673 F.2d 951 (7th Cir. 1982), and is duplicated as Appendix A to the petition. The decision of the District Court is reported at 522 F. Supp. 820 (S.D. Ill. 1981), and is duplicated as Appendix B to the petition.

STATEMENT OF THE CASE

The Nature of the Case

This diversity action was brought by Evra Corporation, formerly Hyman-Michaels Company ("Hyman-Michaels"), at all relevant times an Illinois scrap iron dealer, to recover $2.1 million in profits which Hyman-Michaels might have made on the unanticipated rise in the value of a ship charter which Hyman-Michaels lost following the late payment of a charter installment in April 1973. Hyman-Michaels sued Swiss Bank Corporation ("SBC"), a Swiss corporation with its principal offices in Switzerland, alleging that Hyman-Michaels' claimed losses were attributable to SBC's failure, in Geneva, to effect promptly a request by wire to transfer funds when it received that wire transfer request from the London office of Hyman-Michaels' bank, Continental Illinois Bank and Trust Company ("Continental").* A-2.

The payment in question was to have been made to the owner of the vessel at its bank (Banque de Paris et des Pays-Bas (Suisse) S.A. ("Banque de Paris")) in Geneva. Hyman-Michaels initiated the wire transfer process by a direction to its bank, Continental, which in turn requested SBC to effect the transfer in Geneva. A-2. SBC's role was thus as an involuntary relay, to transfer funds to Banque de Paris in Switzerland when it received a request

* Continental did not become a party to the suit until it was impleaded by SBC. Continental thereafter cross-claimed against Hyman-Michaels and Hyman-Michaels counterclaimed against Continental. A-6. Hyman-Michaels does not seek review of the Court of Appeals' decision affirming judgment for Continental on Hyman-Michaels' claim against it.

from Continental to do so. SBC's involvement in the transfer arose solely from its correspondent banking relationship with Continental.* SBC had no direct relationship with Hyman-Michaels and knew nothing of Hyman-Michaels or its business. Its only knowledge concerning Hyman-Michaels' charter was what could be derived from the telex Continental directed to it—namely, that the payment requested by the telex was for the hire of a vessel for a two-week period. Specifically, SBC did not know the length of Hyman-Michaels' charter of the Pandora, the date payment was due, the provisions of the charter for termination if payment was late, or the history of the charter, which made it of such great value to Hyman-Michaels and which put the charter at risk in the event of any delay in payment. A-10-11.

Hyman-Michaels had entered into the charter for the vessel Pandora in June 1972, when charter rates were very low, for the purpose of hauling scrap. By early 1973, charter rates had risen dramatically and, when its commitment to haul scrap was cancelled, Hyman-Michaels began chartering the Pandora in the spot market at rates substantially above the charter rate. A-2-3, A-6.

Under the terms of the charter, charter payments were due semi-monthly in advance. A-2. While Hyman-Michaels had made the first eight charter payments by wire, thereafter it sent several payments by mail, knowing that those payments would arrive late in Geneva. On the second such occasion, the Pandora's owner attempted to withdraw the vessel from the charter. A-3. The matter was submitted to

* Indeed, its only "contact" with Illinois was its correspondent relationship with Continental. At the time SBC had no office in Illinois and was prohibited by Illinois law from doing business in Illinois. *See* Ill. Rev. Stat. ch. 16½ § 106 (1973).

arbitration where a divided panel declined to permit the owner to withdraw the ship but warned that the termination provisions of the charter would be strictly enforced thereafter. A-3, A-13.

Hyman-Michaels then resumed sending payments by wire transfer. It initiated payment for the time period April 27 through May 11, 1973 on April 25, 1973. Payment for the period was due either at midnight April 26, 1972, as the owner argued, or at the latest at 9:00 p.m. on April 27, 1972, the anniversary date of the charter. *See* A-4. Hyman-Michaels learned early on the morning of April 27 that payment had not been received by the owner's bank, and that the owner was attempting to withdraw the vessel from the charter. It instructed Continental to "persist" in attempting to effect payment. It neither directed that a duplicate payment be made nor took steps to have payment made immediately by other means. It was not until May 1, 1973, when it was clear the initial telex had been lost, that Continental, at SBC's request, re-sent the telexed instructions to SBC, with the transfer of funds to Banque de Paris taking place the following day. A-5.

The issue of the owner's right to withdraw the vessel from the charter was then submitted to arbitration. (A copy of the panel's decision is duplicated in the Appendix to this brief at RA-1-5.) The unanimous decision of the arbitration panel, that the owner could withdraw the vessel from the charter, rested on the panel's finding that Hyman-Michaels had not acted with diligence in attempting to effect payment after it learned that the owner had not received payment on the morning of April 27. A-5-6. The panel found that while Hyman-Michaels was "blameless" for the

initial delay arising from SBC's loss of the telexed instructions, when faced with a delay in payment, it did not do what was required of it to remedy the situation. The arbitrators held that Hyman-Michaels could have effected payment almost immediately by at least two methods—an immediate duplicate payment or a banker's check delivered by hand or special messenger. But, held the panel, "this was not done and Charterers relied upon the Continental Illinois Bank to find and rectify the delayed payment." In the panel's view it was Hyman-Michaels' acts which "therefore, created the opening that owners were seeking to withdraw" from the Charter.* RA-4.

Proceedings Below

Following a bench trial in which Hyman-Michaels sought recovery from SBC on negligence, contract and breach of fiduciary duty theories, the District Court held SBC liable for Hyman-Michaels' lost profits of about $2.1 million and some incidental expenses incurred in the second arbitration. Although the District Court seemed to rest its findings of liability on a tort theory, it apparently viewed the relationship between SBC and Hyman-Michaels as being essentially contractual in nature. Thus it stated: "[i]t is undisputed, however, that a contract existed between plaintiff and Continental. Continental owed plaintiff a duty of care and Swiss Bank, as Continental's correspondent bank, owed plaintiff that same duty." B-13.

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* The panel's initial decision had stated "This being the second such default and the second arbitration under this charter party for the same cause, the charterers cannot be held blameless for failure to exert additional efforts to restore the delayed hire during the 5 days the payment was lost." SBC Appendix on Appeal at 221; *see also* Healy, *Termination of Charter Parties*, 49 Tul. L. Rev. 845, 852 (1975).

In awarding SBC consequential damages, the District Court noted the rule of *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), that "consequential damages may include only those as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of breach of it" (B-24-25), but did not apply that rule. Its only "finding" on SBC's knowledge as to consequential damages was that SBC "as a major international bank, could reasonably foresee that failure to act promptly upon receipt of such a telex message could result in substantial damage to a customer of the bank." B-25.

The Court of Appeals reversed the District Court's decision on the basis of the single issue of SBC's liability for consequential damages.* Initially the Court of Appeals distinguished between the types of damages—direct and consequential—which might result from a bank's failure to transfer funds as requested by wire. A-8. It noted that Hyman-Michaels did not seek to recover any direct damages, which included the funds themselves, if lost, interest on them and the fee paid for the transfer. Hyman-Michaels sought, and the District Court had awarded, exclusively consequential damages. A-8.

The Court of Appeals held that the relevant case law of Illinois and other jurisdictions established that, in this type of commercial case, the rule of *Hadley* v. *Baxendale* applied, regardless of whether the action was brought on a contract or tort theory, and, under the rule of *Hadley*, consequential damages could be awarded only if the de-

* SBC had also appealed on seven other grounds, none of which was addressed by the Court of Appeals.

fendant was put on notice of the special circumstances giving rise to them. The District Court, the Court of Appeals found, did not apply this rule of law: "The legal principles that we have said are applicable to this case were not applied below." A-17. The "foreseeability" found by the District Court was not the type of notice of the circumstances which under the controlling rule of Illinois law justified an award of consequential damages: "[T]hat kind of foreseeability, which is present in virtually every case, does not justify an award of consequential damages." A-17. The Court of Appeals determined as a matter of law that on the undisputed facts SBC was not aware of special circumstances which would give it reason to foresee Hyman-Michaels' losses: "The undisputed facts, recited in this opinion, show as a matter of law that Hyman-Michaels is not entitled to recover consequential damages from Swiss Bank." A-17. Accordingly, the Court of Appeals reversed with a direction to enter judgment for SBC. A-17, A-19.

REASONS FOR DENYING THE WRIT

I.

None of the Traditional Reasons for the Granting of Petitions for a Writ of Certiorari Are Set Forth in the Petition.

The petition does not present any of the types of questions which have commonly been found to warrant the granting of certiorari. It demonstrates no conflict between the circuits; no conflict on a federal question between the federal court and the state court of last resort; no conflict

among state courts on a federal question; no important question of federal law; and no departure from the accepted and usual course of proceedings which would call for an exercise of this Court's power of supervision. *See* Rules of the Supreme Court of the United States, Rule 17.

Petitioner's arguments that the Court of Appeals misinterpreted Illinois intermediate appellate decisions (Pet. at 33-35) and that the rule applied by that Court has undesirable policy implications (Pet. at 14) are facets of petitioner's dispute with the Court of Appeals' reading of Illinois commercial law. This is not a "special and important" reason for granting certiorari. It is the "general policy" and the long-standing practice of this Court to "leave undisturbed" the holdings of federal courts of appeals in cases requiring the application or construction of state law. *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-08 (1949); *accord, Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 462 (1967); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949). The reason for this Court's reluctance to review state law determinations by the courts of appeals is plain: "The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner* v. *United States*, 440 U.S. 48, 58 (1979) (declining to review the state law question on which a divided court of appeals panel had reversed the district court); *accord, United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960); *Estate of Spiegel* v. *Commissioner, supra*, 335 U.S. at 706-07. That the state law issue is, as here, one of first impression, or an especially

difficult one, does not vary this Court's general policy. *See Estate of Spiegel* v. *Commissioner, supra,* 335 U.S. at 707; *United States* v. *Durham Lumber Co., supra,* 363 U.S. at 526. Indeed, the general policy is so well established that where it later develops that the issue raised "primarily implicates" a question of state law and "presents no federal question of substance" the Court has dismissed writs as improvidently granted. *Wolf* v. *Weinstein,* 372 U.S. 633, 636 (1969). There is no reason here to depart from the general rule.

Petitioner's other complaint about the Court of Appeals' decision, that it disregarded the District Court's findings of fact in violation of Rule 52(a) of the Federal Rules of Civil Procedure, does not provide a "special and important" reason to review that Court's decision. Rule 52(a) is not at issue for, contrary to petitioner's contention (Pet. at 19-31), the Court of Appeals did not reverse any relevant findings of fact made by the District Court.* The Court of Appeals applied legal principles misconstrued by the District Court to find that "[t]he undisputed facts, recited in this opinion, show as a matter of law that Hyman-Michaels is not entitled to recover consequential damages from Swiss Bank." A-17. *See* Section III *infra.* As this Court has held, an appellate court is free to make an "independent determination as to the legal conclusions and inferences which should be drawn from" the lower court's findings. *United States* v. *Mississippi Valley Generating Co.,* 364 U.S. 520, 526 (1961); *see United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 598 (1957);

* There is thus no federal question presented concerning the interpretation or application of a rule of federal procedure.

Great Atlantic & Pacific Tea Co. v. *Supermarket Equipment Co.*, 340 U.S. 147, 153-54 (1950).

The Court of Appeals' determination that SBC was entitled to judgment was consistent with the usual and accepted judicial practice. Since the undisputed facts developed at a full trial established as a matter of law that SBC had no reason to foresee the damages sought by Hyman-Michaels, considerations of sound judicial administration called for this resolution rather than a remand. *See, e.g., Grosso* v. *United States*, 390 U.S. 62, 71-72 (1968); *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162, 170-71 (1967); 28 U.S.C. §2106 (1977).

II.

The Court of Appeals Correctly Determined That the Rule of *Hadley* v. *Baxendale* Applied to This Case Under Applicable State Law.

A. The Illinois law applied by the Court of Appeals does not "insulate" banks from liability in electronic funds transfers.

Hyman-Michaels' repeated assertion that the rule of law followed by the Circuit Court "insulates" banks from liability for damages flowing from the failure to effect funds transfers (Pet. at 14-18) is incorrect. Under the long-standing rule of law applied by the Court of Appeals a bank would be liable for direct damages which include the funds transferred, if lost, interest thereon and any fee charged. A-8. *Accord, Sharp* v. *Western Union Telegraph Co.*, 39 Ariz. 349, 353, 6 P.2d 895, 897 (1932). These are the damages which follow in the ordinary course of events from a failure to effect a wire transfer and, contrary to

petitioner's argument (Pet. at 18), these are exactly the sort of damages which are typically suffered if there is delay in payment.

It is not "unrealistic" to impose liability only if the special circumstances giving rise to damages which do not flow in the ordinary course of events from delay have been communicated to the bank. Pet. at 17-18. In the usual case the initiator of a wire transfer will not be subject to forfeiture if there is delay, and there will be no necessity to inform the banks of details of the underlying transactions. In the unusual case, such as this one, where extraordinary loss may flow from delay, there is nothing to prevent the customer from communicating to its bank the special risks involved and asking the bank to fashion a procedure designed to insure prompt payment.*

What is "unrealistic" is to expect banks involved in the electronic funds transfer system to accept and act upon unsolicited requests for transfers, which concern transactions about which the banks have no knowledge, at the risk of being subjected to unlimited unforeseeable damages in the event of a mishap. In the electronic funds transfer system, banks such as SBC are unknowing and involuntary recipients of hundreds of wire transfer requests daily. In this case, for example, there was lacking any prior notice to SBC of the risks Hyman-Michaels would have it run, and any opportunity for SBC to make an informed choice about whether to participate at all in such a high-risk transaction or to specify the type of procedures and level of

* Indeed, Hyman-Michaels argued throughout this proceeding that it gave Continental just the type of individualized notice required by *Hadley* and that Continental shaped the wire transfer procedure accordingly. Moeng Test., Tr. at 79-81. There is nothing in the record to indicate that such notice could not have been given to SBC.

compensation under which it would undertake the transaction. In the absence of such notice and opportunity, SBC here (and banks generally) should not be subject to liability for enormous and unforeseeable losses. *See* A-10-11, A-15-17.

Moreover, adoption of the rule for which petitioner argues would pose tremendous obstacles to the continued, efficient operation of the existing wire transfer system. If that rule were to govern, and banks were to be charged with the extent of damages sought by Hyman-Michaels (*i.e.*, damages nearly 100 times the amount of the wire transfer and nearly one million times the amount charged by Continental for the transfer) no bank could rationally undertake to effect a wire transfer without knowing the nature and extent of the risk of all of its transfers. In the absence of such knowledge it could not take the extraordinary precautions necessary to avoid being saddled with economically devastating liability. Yet this would require it to know in advance details about the business transactions of each of the hundreds of individuals and companies who daily initiate wire transfers to each of its various offices, a result far more disruptive of the efficient operation of the wire transfer system than what petitioner feels is "unrealistic". *See* A-15.

B. The state law authorities unanimously support application of the *Hadley* rule to the facts of this case.

The Court's application of the rule of *Hadley* v. *Baxendale* to determine the extent of damages recoverable for delay in transmission of a wire transfer of funds, regardless of whether the claim is made in tort or contract, was in

accord with the decision in *Hadley* v. *Baxendale* and the case law which has addressed situations similar to this one.* *Hadley* v. *Baxendale* itself involved a tort claim based upon a contractual relationship.** In the line of cases closely analogous to this one—actions against telegraph companies for damages for delay or failure in transmitting a message or funds†—the courts have held, without regard to the theory of liability, that damages will not be recoverable unless the telegraph company had reason to foresee at the time of entering into the contract for delivery that such damages would be the probable result of a breach. *See* 5 A. Corbin, *Contracts* §1019 at 121-23 (1964).

The question was expressly presented to the New York Court of Appeals in *Kerr S.S. Co.* v. *Radio Corp. of America*, 245 N.Y. 284, 157 N.E. 140, *cert. denied*, 275 U.S. 557 (1927), where plaintiff argued that "the action is one in tort for the breach of duty owing from a public service corporation, and that the rule of *Hadley* v. *Baxendale* does

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* Petitioner's suggestion that the Court of Appeals decided this case as a "contract case" rather than a "tort negligence case" (Pet. at 38) misses the point. The ruling of the cases upon which the Court of Appeals relied and the rationale of the Court's decision is that the *Hadley* rule of damages, which governs the discrete category of commercial cases resolved here, does not depend on the labels affixed to the cause of action. Petitioner's argument also ignores the fact that it asserted both contract and tort claims below and the District Court viewed the relationship of SBC and Hyman-Michaels as essentially contractual in nature. *See* B-13.

** *See* Danzig, *Hadley* v. *Baxendale: A Study in the Industrialization of the Law*, 4 J. Leg. Stud. 249, 260 (1975), *citing Hadley* v. *Baxendale*, *supra*, 9 Ex. at 343, 156 Eng. Rep. at 147.

† Distinguishing the telegraph cases from the instant case is that the telegraph company at least had the opportunity of direct face-to-face contact with the customer. Here, Hyman-Michaels was Continental's customer and SBC was without means of ascertaining the peculiar risks of this transaction.

not protect the carrier unless sued upon the contract." *Id.* at 292, 157 N.E. at 142. Rejecting that argument, then Judge Cardozo explained that "[t]hough the duty to serve may be antecedent to the contract, yet the contract when made defines and circumscribes the duty", cited numerous decisions ignoring the tort-contract distinction in the damages context, and noted that "there is little trace of a disposition to make the measure of the liability dependent on the form of the action." *Id.* at 292, 157 N.E. at 143. *Accord, Sharp* v. *Western Union Telegraph Co., supra,* 39 Ariz. 349, 353, 6 P.2d 895, 897 (1932).

The only Illinois case dealing with liability for failure to transmit money is *Siegel* v. *Western Union Telegraph Co.,* 312 Ill. App. 86, 37 N.E.2d 868 (1st Dist. 1941). While the opinion in *Siegel* does not state that the action was brought in tort, neither does it indicate that the case was pleaded as a contract claim. Pet. at 34. In fact, the Appellate Court refers to defendant's "negligence" in handling the transmission. *Id.* at 88, 91, 95, 37 N.E.2d at 869, 871, 872. The Illinois Appellate Court in *Siegel* evidently did not deem it sufficiently important to note the nature of Siegel's cause of action. The Court of Appeals properly found that *Siegel* by implication supports application of the *Hadley* rule in analogous cases regardless of the appellation applied to the cause of action.*

* The Circuit Court's acknowledgement that "[a]s so often in diversity cases, there is an irreducible amount of speculation involved in attempting to predict the reaction of a state's courts to a new issue" (A-11) does not cast doubt on its conclusion. Pet. at 33. The courts of appeals are required to decide state law issues regardless of whether that law is settled or uncertain. *Meredith* v. *Winter Haven,* 320 U.S. 228, 231 (1943).

The 1903 Illinois Appellate Court opinion which petitioner asserts as controlling, *Miller* v. *John*, 111 Ill. App. 56 (2d Dist. 1903), *aff'd*, 208 Ill. 173, 70 N.E. 27 (1904), has nothing to do with the issue presented here.* The plaintiff there had been defrauded into exchanging land which he owned for land represented by the defendants to be far in excess in value of the land plaintiff held although in fact of much lesser value. The procedural issue before the court was whether causes of action for fraud and deceit and for fraud arising out of an agency relationship were misjoined, not whether the rule of *Hadley* would apply to limit the recovery of consequential damages.** *Hadley* does not apply to fraud actions, and a fraud case such as *Miller* has no bearing on the issues herein. The court's conclusion was simply that labelling the parties principal and agent

* Petitioner raised this case for the first time on the petition for rehearing. It ill behooves petitioner to suggest that the *Miller* case, available at the time of the appeal but not cited by petitioner, is somehow controlling. Nor did petitioner cite below the 1924 law review article (Pet. at 32-33) upon which it here relies. That article in any event does not say, as petitioner suggests, that the *Hadley* rule applies "only" in contract cases.

** Even if the *Miller* decision were on point, it would not be dispositive. An Illinois Appellate Court decision is not binding on a federal court in all circumstances. *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967). There was evidence here to indicate that the highest court of Illinois would not follow petitioner's interpretation of the *Miller* decision. Not only have post-*Miller* courts in Illinois and other jurisdictions applied the *Hadley* rule to cases analogous to this one, but the Illinois legislature has since recognized the necessity of limiting liability in the analogous situation of collecting banks. Ill. Rev. Stat. ch. 26 §4-103(5) (1979) (rule that a collecting bank is not liable for consequential damages in the absence of bad faith). *See also Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566, 574 (1921); *Siegel* v. *Western Union Telegraph Co.*, *supra* (upholding limitation of liability of telegraph and telephone companies for negligent transmission under federal regulatory law). Moreover, *Miller* has never been cited for the proposition for which petitioner propounds it.

does not change the essential nature of the claim asserted—there, a tort claim. To the extent the case is applicable here at all it supports application of the *Hadley* rule to this commercial transaction. Characterizing SBC as Hyman-Michaels' agent, as the District Court did,* does not change the rule of damages to be applied to what is essentially a contractual cause of action.

C. The Court of Appeals properly interpreted the rule of *Hadley*.

The Court of Appeals' reading of *Hadley* (*i.e.*, "that consequential damages will not be awarded unless defendant was put on notice of the special circumstances giving rise to them" (A-10)), far from being "parsimonious" (Pet. at 38), is entirely consistent with the long standing American interpretation of the *Hadley* rule.** The classic and continuing formulation of the *Hadley* rule requires that the

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* The District Court's dicta on the agency issue did not rest on any factual analysis but solely on an analogy of a correspondent bank to a collecting bank under Article 4 of the U.C.C., which, under Section 4-201 of the Code, is presumed to be an agent of the bank's customer. Strikingly, the District Court declined to apply the provision of Article 4 which eliminates liability of a collecting bank for consequential damages in the absence of bad faith. Had it carried through on its analogy, instead of selectively applying the rules of Article 4, the massive liability to which the District Court subjected SBC would never have been imposed. Alternatively, had the District Court looked to the split of authority which existed before the Code concerning the relationship of a collecting bank and depositor, it might well have followed those jurisdictions which held no agency relationship to exist in that situation. *See* Annot., *Liability of Correspondent Bank to Depositor in Forwarding Bank for Breach of Duty as to Collection of Paper*, 58 A.L.R. 764, 765 (1929). *Cf. Cohen* v. *Tradesmen's National Bank*, 262 Pa. 76, 105 A. 43 (1918) (collecting bank is not agent of drawer of check negligently handled by collecting bank).

** Since the rule of *Hadley* is applicable, petitioner's reliance on authorities concerning the standard of foreseeability in tort (Pet. at 36) is misplaced.

defendant must have "reason to foresee [the injury] as a probable result of his breach when the contract was made." *Restatement (First) of Contracts* §330 (1932). The Restatement (Second) of Contracts §351(2) (1981) states that a party in breach is liable for a foreseeable loss, which is defined "as a probable result of a breach because it follows from the breach (a) in the ordinary course of events." If the injury does not follow the breach in the ordinary course of events, the party in breach is liable for consequential damages only if it "be shown specifically that the defendant had reason to know the facts and to foresee the injury," *Restatement (First) of Contracts* §330 (1932), or, if loss follows from the breach "as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know." *Restatement (Second) of Contracts* §351(2)(b) (1981). The rule is "objective" in that it does not require an actual agreement for a specific loss or for the defendant actually to have foreseen the precise loss. Nevertheless, characterizing the test as objective (Pet. at 39) leaves unchanged the requirement that if the injury does not follow the breach in the usual course of events, the defendant must have "had reason to know" of special circumstances from which it does flow and reason to foresee the injury.*

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* The sole American case cited by Hyman-Michaels (Pet. at 40) is not to the contrary. Indeed, *Gurney Industries, Inc.* v. *St. Paul Fire & Marine Insurance Co.*, 467 F.2d 588, 598 (4th Cir. 1972), applying North Carolina law, relies on the Restatement (First) of Contracts §330 and quotes language from controlling North Carolina authorities which is verbatim the language of *Hadley* v. *Baxendale*. Professor Gilmore in *The Death of Contract* at 83-84, 88 (1974) does not cite a single American case which modifies the rule of *Hadley* and the continued adherence to the *Hadley* rule of the Restatement (Second) of Contracts, published some seven years after that book, undercuts any suggestion therein that the American rule has changed.

Petitioner's suggestion that the concept of individualized notice of special circumstances does not comport with the reality of modern banking transactions (Pet. at 40-41) is contrary to the position embodied in the just published Restatement (Second) of Contracts §351 (1981), and ignores the fact that the Illinois courts continue to adhere to the *Hadley* rule. *E.g., Spangler* v. *Holthusen*, 61 Ill. App. 3d 74, 378 N.E.2d 304 (2d Dist. 1978).

III.

The Court of Appeals Did Not Disregard the District Court's Findings of Facts.

The Court of Appeals did not reverse any of the District Court's findings on foreseeability of damages, or substitute its own findings for those of the District Court. Indeed, there were no relevant findings on foreseeability to reverse for, contrary to petitioner's contention (Pet. at 24), the District Court made no finding on whether SBC had reason to foresee the injury for which Hyman-Michaels sought recompense in this action. B-25.* The District Court's only finding was that SBC could foresee some injury resulting from a delay in effecting a fund's transfer—*i.e.*, SBC could foresee that failure to act promptly upon receipt of a wire transfer request could result in "substantial damage".** This finding was neither ignored nor reversed

* There is no finding by the District Court that, as petitioner argues, "Swiss Bank did foresee or at least ought to have foreseen 'in a general way' the consequence of lost profits resulting from its negligent mishandling of a telex, even if the precise extent of the harm might have been unforeseen." Pet. at 37-38.

** Had the District Court found on the facts before it that SBC had reason to foresee the type of harm Hyman-Michaels suffered, the finding would have been clearly erroneous. That many wire transfers involve large sums could not possibly have put SBC on notice of a

(footnote continued on next page)

by the Court of Appeals. Pet. at 23-24. Rather, the Court of Appeals specifically considered it and expressly ruled that this type of "general foreseeability" was insufficient under the prevailing law of Illinois to justify an award of consequential damages. A-17.

The Court of Appeals' conclusion as a matter of law that Hyman-Michaels was not entitled to recover consequential damages was compelled, as the Court found, by the undisputed facts. The only circumstances about Hyman-Michaels of which SBC was aware was that the requested transfer was payment for the hire of a vessel for a two-week period. SBC "did not know or have reason to know how at once precious and fragile Hyman-Michaels' contract with the Pandora's owner was." A-15. Hyman-Michaels' contention that "anyone who has ever paid rent on a monthly basis on an apartment knows that in most cases the payment is due on or before the date beginning the monthly rental period" (Pet. at 23), is an argument, not a finding of fact, and was made to, and rejected by, the Court of Appeals. Common experience is that rent is due within some specified period after the beginning of the period for which it is paid, and delay in payment normally does not result in eviction or forfeiture. The Court of Appeals also properly rejected any suggestion that the use of a wire transfer could be the basis for putting SBC on notice of the type of damages involved here.* Wire transfers are

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loss of the magnitude Hyman-Michaels claims to have suffered. The measure of loss from delay of a wire transfer is usually interest, and the interest for a few days on even a very large sum does not compare to the lost profits Hyman-Michaels seeks—amounting to nearly 100 times the amount of the wire transfer.

* This conclusion does not reverse that of the District Court, which was only that use of a wire transfer put SBC on notice that delay could result in "substantial damage." B-25.

today used extensively and routinely by businesses. SBC at its Geneva office alone handles tens of thousands of such requests annually. The election by the sender of each of these requests to use the wire transfer system could hardly give SBC reason to foresee a risk of loss from delay of a hundred times the amount of the given transfer.

The Court of Appeals did not redecide or reconsider, as Hyman-Michaels seems to suggest (Pet. at 25), the ruling of the District Court on the issues of negligence or contributory negligence.* Had it wished to do so, of course, the Court could have determined the issue of contributory negligence as a matter of law, as did the District Court.** B-21. The Court of Appeals, however, did not address whether Hyman-Michaels was barred from recovery under the tort doctrine of contributory negligence because of a failure to act with "reasonable care." Rather, the Court of Appeals assessed the facts found by the District Court and considered Hyman-Michaels' conduct in determining

* For this reason, quotation of the District Court's findings on whether SBC owed Hyman-Michaels a duty of care and whether it had breached that duty (Pet. at 19) is misplaced.

** Under Illinois law contributory negligence may be decided as a matter of law. *E.g., Pearson* v. *Ford Motor Co.*, 32 Ill. App. 3d 188, 192, 336 N.E.2d 528, 531 (1st Dist. 1975); *see Hulett* v. *Central Illinois Light Co.*, 99 Ill. App. 3d 211, 424 N.E.2d 1366 (3d Dist. 1981). Hyman-Michaels is wrong in stating that a finding of lack of contributory negligence is a finding of fact "which cannot be overturned on appeal unless there was no support for such a finding on the record." Pet. at 25-26. The Fifth Circuit in *United States* v. *Hill Lines, Inc.*, 175 F.2d 770 (5th Cir. 1949) (Pet. at 26), an action brought under the Federal Tort Claims Act, relied on Texas law, not Illinois law. Moreover, the cases petitioner cites make clear the findings of negligence are subject to the same clearly erroneous rule as other findings—they may be set aside when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". *McAllister* v. *United States*, 348 U.S. 19, 20 (1954) (Pet. at 26); *see* Pet. at 20-21.

whether consequential damages should be imposed on SBC for its "middleman" link in an electronic funds transfer.

None of the material facts relied upon by the Court in its decision were reversals of findings made by the District Court, as Hyman-Michaels claims. Pet. at 26. The Court correctly noted that Hyman-Michaels had waited "till *arguably* the last day before payment was due to instruct its bank to transfer the necessary funds overseas" (*i.e.*, that it waited to the last possible moment to try to make payment (A-11)). A-13 (emphasis added). The payment was due "in advance" and was for the period April 27-May 11. The owners of the vessel had argued in the arbitration that payment was required by the end of the day on April 26th and the arbitrators apparently did not decide the question, stating only that payment was not made "when due on April 26th or April 27." RA-3. While the District Court felt that payment was due on April 27th, this was not a finding of fact but rather an interpretation of the charter and thus a question of law for the court, *e.g.*, *Aircraft Products Co.* v. *Universal Oil Products Co.*, 100 Ill. App. 3d 694, 697-98, 427 N.E.2d 585, 587 (1st Dist. 1981), and the Court of Appeals did not reverse that conclusion when it noted that payment was "*arguably*" due on April 26th. It is that fact which is of significance in assessing whether Hyman-Michaels acted prudently in the initiation of the wire transfer.

Hyman-Michaels' declaration that it allowed three business days lead time to carry out the instruction (Pet. at 26) ignores the fact, which the District Court acknowledged (B-9), that morning in Chicago is late afternoon in Geneva. Morning on April 25 in Chicago in neither three business

days nor three calendar days before the end of April 27 in Geneva, the latest that even Hyman-Michaels suggests payment was due, and is barely one and a half business days from the date payment was "arguably" due.

Regardless of whether the District Court felt a longer lead time would have produced a different result in this case (Pet. at 27), it is apparent that a longer lead time would have materially lessened the chance that mere delay in handling by one of the banks would have caused late payment and given the vessel owner an excuse to withdraw. *See* Seipmann Test., Tr. at 1140-41. The significance of sufficient lead time is established by the procedures established by Hyman-Michaels itself to handle its wire transfer payments after the April 27 incident. It substantially lengthened the lead time as well as required a confirmation from the owner's bank, Banque de Paris. Continental Ex. 45; Moeng Test., Tr. at 168-72.

Both the arbitration panel which held against Hyman-Michaels and permitted the vessel owner to withdraw the Pandora from the charter (RA-4) and the Court of Appeals (A-13) were struck by Hyman-Michaels' lack of diligence once it learned that payment had not been received.* The record supports the Court's conclusion that Hyman-Michaels did not act with prudence after learning, early on April 27, that the Pandora's owner had not received payment and was attempting to cancel the charter. Hyman-Michaels alone knew the necessity for immediate payment and it was up to Hyman-Michaels to communicate

* The District Court made no finding on this point, and none of the three actions taken by petitioner which the District Court noted (Pet. at 28-29) undercuts the conclusion of the arbitrators and the Court of Appeals concerning petitioner's conduct.

the urgency of the situation to Continental, and to monitor Continental's efforts.* Hyman-Michaels argues, where it suits it, that wire transfers are "essentially instantaneous". Pet. at 26. Had Hyman-Michaels acted immediately and instructed Continental to send another telex forthwith, the transfer might still have been effected on April 27 and certainly by April 30. Seipmann Test., Tr. at 1146-47, 1149-50. In light of the rationale for the arbitrators' decision, this could have made all the difference. A-13.

* The merits of Hyman-Michaels' dispute with Continental as to whether or not it was necessary to authorize a duplicate payment are irrelevant to a determination of SBC's liability for consequential damages. The fact is that Hyman-Michaels' direction to Continental to "persist in attempting to make this payment" did not result in prompt payment after Hyman-Michaels received notice of withdrawal from the Pandora's owner on the morning of April 27.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be denied.

Respectfully submitted,

JEFFREY BARIST
Attorney for Respondent
*Swiss Bank Corporation**

DWIGHT A. HEALY
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ALBERT F. SCHULTHEIS
Of Counsel

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* Swiss Bank Corporation has no parent company. Swiss Bank Corporation has the following subsidiaries (except wholly owned subsidiaries) and affiliates: Adler & Co. Ltd.; Ferrier Lullin & Cie S.A.; Bodenkreditbank in Basle; INDELEC Swiss; Swiss Electric and Traction Company; INDELEC Finanz AG; Commercial Bank of Basle Financing and Participations Company; International Financing Company Ltd.; Factors Ltd.; W. H. Beglinger Finance Corporation; SERIMO Immobiliendienste AG; UNEFICO Universal Engineering and Finance Corporation; Prognos Ltd.; INTERFONDS International; Societe Internationale de Placements, SIP; Universal Engineering Corporation; TRANSPLAN Ltd.; Banque de Placements et de Credit; and Fominver S.A.

APPENDIX

Second Arbitration Award

AWARD

by

Michael A. van Gelder (Chairman)
Hammond L. Cederholm
Peter Siebel, Jr.

In the matter of
the Arbitration

— between —

HYMAN MICHAELS COMPANY
Time Charterers

— and —

PANDORA SHIPPING COMPANY
Owners of
M/V PANDORA

APPEARANCES: For Charterers:

HILL, BETTS AND NASH
(D. I. Gilchrist, Esq. of Counsel
(S. J. Murray, Esq.

For Owners:

KIRLIN, CAMPBELL AND KEATING
(David Nourse, Esq. of Counsel
(Kevin Slakas, Esq.

HISTORY:

This Arbitration, the second one to be held under this Charter Party, is called by Charterers upon Owners notice of withdrawal of vessel from service for alleged late payment of hire installment No. 19. It was agreed by the parties that the matter should be arbitrated and in the meanwhile the vessel would perform the intended voyage (Grain U. S. Gulf/Poland), subject to any damages that might subsequently be payable dependent upon this Award.

A Submission agreement was drawn in two parts, and signed by Attorneys for the contestants.

Part I calls upon the Panel to decide the question:

> "Has the Owner the right under the terms of the Charter Party dated June 19, 1972 and all the relevant facts and circumstances relating thereto to withdraw the vessel from the Time-Charter?"

PART II

Dependent upon the reply to that question, all questions of damages of either party, if any, to be submitted to a further determination by the same Panel, in the event that the parties hereto are unable to agree among themselves as to such damages.

HEARING:

The Panel heard Owners presentation at a hearing on May 8th and the Charterers presentation, with testimony from witnesses on May 14th. As agreed, Briefs were to be submitted so as to reach the Panel shortly after noon on May 17th. These were received in due time. Owners also presented in letter form a reply Brief which reached all members of the Panel very shortly before the time set

for deliberations on May 18th, and clearly later than the early afternoon of May 17th. As this was not prescribed at the hearing, as stipulated in the record, the Panel have found its presentation out of order, and have not considered it in its deliberation.

AWARD:

The Panel having carefully read the documents and testimony presented to it, and taking into consideration the ruling made on the same matter at the first Arbitration, are unanimously of the opinion that Charterers were in breach of their obligations in the fact that the payment of the 19th hire installment did not reach Owners at the proper time in accordance with the Charter Party conditions. However, the Panel is unanimously of the opinion that the root cause of this situation did not lie with Charterers, as very definite proof was shown to the Panel that payment was properly made by Charterers in sufficient time on April 25th A.M., through their Bank, Continental Illinois Bank of Chicago; further that this Bank acting properly and expeditiously in accordance with established proven practices, instructed their correspondent bank (Swiss Bank Corporation) in Geneva, Switzerland, by telex in due time to make the said payment to Owners' bank in Geneva, but that Swiss Bank Corporation, having acknowledged the message by teletype (answerback automatically received by Continental Illinois Bank) thereupon lost the said instructions and failed to make payment when due on April 26th or April 27th. Charterers were only made aware of this matter upon receipt of a message from Owners on April 27th at 8:30 A.M. Chicago time, that vessel was being withdrawn for non-payment of the 19th hire installment.

Up to this point, the Panel regards Charterers as blameless and having properly executed their Charter Party commitments and obligations in this matter. (Bank error being beyond their control).

The Panel next considered the question of whether Charterers, on being faced with this situation, did everything in their power to remedy it. The action taken was immediate but did not prove to be adequate, in that the Bank and it's correspondent required some 5/6 days to trace and effect the lost instruction to remit. Charterers could have ordered an immediate duplicate payment—or even sent a Banker's check by hand or special messenger, so that the funds could have reached owners' Bank, not later than April 28th. This was not done and Charterers relied upon the Continental Illinois Bank to find and rectify the delayed payment. This, therefore, created the opening that Owners were seeking to withdraw the vessel from service under a Charter Party that they entered into last summer before the market rates rose to current levels. This Panel is unanimous in their view that Owners were looking for any slight breach by Charterers (as evidenced by the telex message sent giving notice of withdrawal on the first possible moment and even before the actual anniversary time on April 27th). Charterers acted imprudently in not allowing time for any Bank delays in payment transfer arrangements and the Charter Party Clause 5 clearly gives Owners the right to withdraw the vessel. That is the legal and contractual situation, and with reluctance, the Panel unanimously find that Owners are entitled to exercise their liberty as set out in Clause 5 to withdraw the vessel from the service of the Charterers.

However, with equal unanimity, the Panel finds that in all equity, it would be quite improper for the Owners to profit unduly and Charterers to suffer unreasonable financial loss in this case, as Charterers were partially in this position by third parties' inaction. This Panel would be inclined to consider a reasonable and equitable financial arrangement but under the terms of the second part of the Submission Agreement are not empowered to do so.

The Panel unanimously set their fees at a total amount of $1950.00 payable as to $325.00 to be paid to each arbitrator by Owners and $325.00 to be paid to each arbitrator by Charterers and $15.00 by Charterers and Owners each to the Chairman for expenses in preparing the Award. Costs of transcript are to be shared equally and each party to pay it's own legal expenses. Arbitrators fees and expenses as noted and all other items of expense as expressed herein are to be considered as part of this Award. Responsibility for payment of fees and expenses will be joint and several as between Owners and Charterers, and if in the first instance payment is made by either party, it will be entitled to recover same from the other as part of their Award.

/s/ HAMMOND L. CEDERHOLM

Hammond L. Cederholm, Arbitrator

/s/ PETER SIEBEL, JR.

Peter Siebel, Jr., Arbitrator

/s/ MICHAEL A. VAN GELDER

Michael A. van Gelder, Chairman

New York, N. Y.
May 21, 1973